THE ATTORNEY GENERAL OF TEXAS

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Mr. Karl E. Hays
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Open Records Decision No. 519

Re: Whether information held by the Bexar Metro 911 Network District is subject to the Texas Open Records Act, and, if so, whether it may be withheld under section 3(a)(8) of the act (RQ-1544)

Dear Mr. Hays:

The 911 communications district of Bexar County received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for a recording of a request for emergency aid for an incident in which four members of a family were murdered. You request a decision as to whether the 911 district is the "proper party" to whom this request should be addressed.

The Bexar Metro 911 Network District is a governmental body within the meaning of section 2(1) of the Open Records Act. The district was established under the Emergency Communication District Act and is supported by public funds. V.T.C.S. art. 1432d, §§ 5, 12(b). Tape recordings of calls made to the 911 number fall under the definition of "public records" in section 2(2) of the Open Records Act, which includes "the portion of all documents . . . or other written, printed, typed, copied, or developed materials which contains public information." See Open Records Decision No. 32 (1974). Section 3(a) defines public information as "[a]ll information collected, assembled, or maintained by governmental bodies . . . in connection with the transaction of official business." A tape recording of a call made to a 911 district that by statute must provide a communication network arguably constitutes information collected in connection with the district's official business.

Nevertheless, you claim that the district merely acts as a conduit for the governmental bodies it serves and that it is not the custodian of the tapes. Your request letter states that the district "has no real connection with the calls other than the fact that it served as a conduit by which the call was transferred to the . . . provider of emergency services." You suggest that a request for the tape at issue should be directed to the San Antonio Police Department.

Attorney General Opinion JM-446 (1986) addressed a related issue. The State Purchasing and General Services Commission received an open records request for records of long-distance calls made from numbers assigned to the Texas Supreme Court. The commission operates the Statewide Telecommunications System and the Capitol Area Centrex System. These systems handle long-distance calls made by the Texas Supreme Court. The records of the judiciary are exempt from the Open Records Act. V.T.C.S. art. 6252-17a, § 2(1)(G). The records of the commission are not. See V.T.C.S. art. 6252-17a, § 2(1)(A). Attorney General Opinion JM-446 determined that the commission should be considered the agent of the court insofar as the commission collects the court's telephone records. Consequently, the requested telephone records constituted the records of the judiciary and were, therefore, exempt from the act even when held by a governmental body subject to the act. See also Open Records Decision No. 513 (1988) (grand jury records held by the district attorney are exempt).

Attorney General Opinion JM-446 and similar decisions, however, do not resolve your question. Attorney General Opinion JM-446 noted:

> the question here is not whether a list of telephone calls can be considered "public information" under the Open Records Act. If the list were the record of a department or agency covered by the act, and if no exception allowed by the act applied, clearly it could be so considered. See Open Records Decision No. 40 (1975).

Thus, Opinion JM-446 is limited to the issue of judicial records held by a governmental body subject to the act.

The issue of control and possession of agency records is discussed in a federal case interpreting the federal Freedom of Information Act (FOIA). See 5 U.S.C. § 552. Construction of the FOIA does not control construction of

the Texas Open Records Act. Because much of the state act was based on the federal act, however, federal cases that discuss the FOIA can be instructive. Open Records Decision No. 492 (1988); see Attorney General Opinion No. H-436 (1974). The FOIA does not directly define "agency records" subject to the act; the scope of the term "agency records" stems from the general description of records that are subject to the act. See 5 U.S.C. § 552(a)(1), (a)(2). In contrast, the Open Records Act defines "public records" subject to the act. Nevertheless, federal cases that address when an agency may be deemed to possess and/or control records transferred to or from another entity are instructive with regard to the issue at hand.

In International Bhd. of Teamsters v. National Mediation Bd., et al., 712 F.2d 1495 (D.C. Cir. 1983), the court held that computer-generated, gummed address labels given by Trans World Airlines to the National Mediation Board in compliance with a court order were not "agency records" subject to the FOIA. The court held that the temporary, transitory possession of these address labels by the board did not constitute "control" of those labels. The court relied on the control test adopted in Goland v. Central Intelligence Agency, 607 F.2d 339, 347-48 (D.C. Cir. 1978).

Goland involved a request for documents about the legislative history of the Central Intelligence Agency's organic statutes. The court held that a transcript, held by the Central Intelligence Agency, of legislative hearings on the creation of the agency was not an agency record because it constituted a congressional document, not an agency record. Id. at 345-46. The FOIA does not include Congress as an agency subject to the act. Id. The court relied on the fact that the transcript remained in the control of Congress. Id. In Goland, the court relied on Cook v. Willingham, 400 F.2d 885 (10th Cir. 1968).

In Cook, the court held that a presentence investigation report in the physical possession of the warden of a federal penitentiary was constructively possessed by the court for which the report was created. 400 F.2d at 886. Because a court is not an agency subject to the FOIA, its records are not agency records subject to the FOIA. Id.

Both Cook and Goland take the approach followed by this office in Attorney General Opinion JM-446 (1986) for court records and in Open Records Decision No. 513 (1988) for grand jury records. The Teamsters decision extends the

rationale of these decisions to a new situation: a situation that does not involve a governmental entity that is exempt from the FOIA. In Opinion JM-446, this office cautioned against making a similar extension under the Texas Open Records Act.

Reliance on Cook and its progeny is questionable in light of the United States Supreme Court's decision in United States Dep't of Justice v. Julian, 108 S. Ct. 1606 (1988). In Julian v. United States Dep't of Justice, 806 F.2d 1411 (9th Cir. 1986), aff'd 108 S. Ct. 1606 (1988), the court held that presentence investigation reports are "agency records" when in the possession of an agency subject to the FOIA. The court relied on Berry v. United States Dep't of Justice, 733 F.2d 1343, 1349 (9th Cir. 1984), in which it held that court-generated documents are agency records if they are 1) in the possession of an agency subject to the FOIA and 2) prepared substantially to be relied on in agency decision-making. The Supreme Court affirmed, without discussion, the Ninth Circuit's decision regarding agency records in the Julian case.

Further, the Open Records Act expressly defines "public records" subject to the act. Section 2(2) defines public records to include "the portion of all documents . . . which contains public information." Section 3(a) defines "public information" as "[a]ll information collected, assembled, or maintained by governmental bodies . . . in connection with the transaction of official business." This definition of "public records" is arguably broader than the scope of "agency records" under the FOIA. The Open Records Act contains exceptions for trade secrets, see art. 6252-17a, § 3(a)(10); for privacy, see, e.g., art. 6252-17a, §§ 3(a)(1), 3(a)(9); and for rare books, original manuscripts, and letters, see art. 6252-17a, §§ 3(a)(19), 3(a)(20). The legislature's inclusion of these exceptions indicates that "information" subject to the act clearly includes materials prepared by private individuals or "outside" entities when the materials are in the possession of governmental bodies. See Open Records Decision Nos. 280 (1981); 231 (1979). The reverse is also true. It would be inconsistent with the language of the Open Records Act to conclude that the act does not include information collected by a special district created specifically to collect that information simply because the information was intended to be transferred later to another entity.

Your request letter states that:

> the 911 District does not have possession of the recording in question. The District has made numerous requests upon the San Antonio Police Department for a copy, transcript or the original of the recording, but have been unable to obtain one.

For this reason, as a practical matter, you claim it would be impossible to comply with the request the district received.

As a general rule, the Open Records Act does not require a governmental body to obtain information that is not in its possession. Open Records Decision Nos. 492 (1988); 445 (1986); 317 (1982). Although no law expressly requires the district to retain a copy of the tapes it provides to the governmental bodies it serves, if the district retains a copy, the copy is subject to the act.

If the district makes or retains copies or tapes of any incoming calls, you contend that the district is not the appropriate party to receive an open records request because the district has "insufficient information" to deal with a request. This argument is without merit. Under the Emergency Communication District Act:

> The district, when created, constitutes a body corporate and politic, exercising public and essential governmental functions, having all the powers necessary or convenient to carry out the purposes and provisions of this Act, including the capacity to sue or be sued.

V.T.C.S. art. 1432d, § 12(a).

The legislature expressly empowered the district to carry out its duties as a governmental agency. As a government body, the district is charged with complying with the Open Records Act; the difficulty or cost of compliance does not determine whether the information is available to the public. See Attorney General Opinion JM-672 (1987). Transferring information from one governmental agency to another in order to avoid compliance with the act contravenes the Open Records Act.

If the district receives a request for a tape before the district has transferred the tape to the governmental body for whom the call was taken, the district cannot transfer the tape after receiving a request simply to avoid having to comply with the request. The district may assert exceptions on behalf of the governmental body for which the call was taken and should notify the governmental body that the district received a request. See generally Attorney General Opinion JM-446.

SUMMARY

The Bexar Metro 911 Network District is a governmental body within the meaning of section 2(1) of the Texas Open Records Act, article 6252-17a, V.T.C.S. When the district records information on behalf of one of the governmental entities it serves, the tapes it records are records subject to the act. Once the district receives a request for one of the tapes in its possession, it cannot transfer the tape to the governmental body simply to avoid having to comply with the act. After tapes are transferred, requestors should be directed to the governmental entity on whose behalf the district took the call at issue.

Very truly yours,

Jim Mattox

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